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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 289

EDYTHE YENOWINE,
ELSIE DENSMORE,
DONALD D. DENSMORE and
DANIEL W. ROWE, Administrator of the Estate of LILA CRAWFORD, Deceased, - *Petitioners,*

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, - - - - *Respondent.*

REPLY BRIEF FOR PETITIONERS.

The Petitioners deem it desirable to offer this reply in order to clarify certain matters contained in Respondent's brief and in addition to point out omissions therein which are in themselves illuminating.

The Respondent has refused to accept our statement of the questions presented (Petition, pages 2-3), and has instead gone back to the period before the opinion of the Court of Appeals was entered by merely substituting a rehash of the question as presented to that Court. To accept such question now as the sole guide to this Court would, of course, ignore the issues raised by the Court of Appeals in its opinion and which

should be examined now in determining whether or not that Court erred. It is our belief that the Respondent has dodged the questions as presented in our Petition for the simple reason that it was unable to answer them and instead has contented itself by the use of innuendo in attempting to explain one or two of them.

For example, we refer the Court to page 4 of Respondent's brief where after first stating that it wished to correct "inaccuracies" in our statement of the case Respondent then immediately proceeds to make one itself by attempting to answer our question No. 4 (Petition, page 3), through its assertion that it "did not agree that said instruction should be given to the jury" but instead "made motions for a directed verdict at the conclusion of the plaintiff's and intervenors' proof and again at the conclusion of all of the proof." Of course, such action by the Respondent was merely directed toward the alleged insufficiency of the *proof* and had absolutely nothing at all to do with the point we raised in question No. 4—and which we reassert—which is that the Respondent entered no objection to the trial court's instructions to the jury on the definition of "replacement" nor did it offer any definition of the word "discard" contained in said instruction. So, the Respondent, by innuendo, is here attempting to equate a motion for a directed verdict with an objection to the Court's instruction which we submit is stretching things too far.

At page 7 of Respondent's brief its citation of and heavy reliance upon the case of *Mitcham* v. *Travelers Indemnity Co.*, 127 F. 2d 27 (C.C.A., 4) (1942)—and

which has been cited in the Petition as supporting our position on the issue of notice—is surprising since it does not in any manner support Respondent's position. The best way of pointing this out to the Court is to refer to the case of *Brescoll* v. *Nationwide Mut. Ins. Co.*, 116 Ohio App. 537, 22 Ohio Ops. 2d 423, 189 N. E. 2d 173, which at page 176 of its opinion had this to say about the *Mitcham* case:

> "However, that decision turned *primarily* upon the failure of the insured to give notice of the acquisition of the second automobile within ten days following the date of its delivery, as specifically required by the terms of the policy involved in that case. Furthermore, as pointed out by the Superior Court of Delaware in Nationwide Mutual Ins. Co. v. Mast, supra, in the Mitcham case the second car was bought as an *additional* vehicle, and *with a trade-in of a relative's car,* and could not be considered a replacement for the original insured car. See, also, Maryland Indemnity & Fire Ins. Exchange v. Steers (1960), 221 Md. 380, 157 A. 2d 803, distinguishing the Mitcham case" (Emphasis added).

In the case at bar Mrs. Yenowine could not possibly have claimed coverage on the 1953 Plymouth following her notice to the insurance company to transfer coverage to the 1956 Plymouth (and which notice Respondent does not challenge) because the insurance company would simply have relied on that notice as a bar.

At page 10 of its brief Respondent is correct in stating that Kentucky does not have a "compulsory"

Financial Responsibility Law. However, this is actually immaterial in so far as the point we were making in the Petition and which we reassert here which is that Kentucky does have a Financial Responsibility Law and that there is authority in a number of states even as regards insurance voluntarily carried, that the injured person is not subject to defenses arising out of breach of conditions subsequent which would have been available to the insurer as against the insured, 76 ALR 222 *et seq.*, 123 ALR 989, 18 ALR 2d 499 *et seq.*, 85 ALR 75 *et seq.*, 106 ALR 535. As stated in the Petition Kentucky allows such defenses and so our point is merely this: That from a moral consideration since the Respondent has been permitted to use these defenses against the intervening Petitioners that said Petitioners have an added right to rely on the cases allowing coverage where there is "temporary retention" of the old car by the insured.

In addition, since the Court of Appeals in its opinion substituted a different rule for "replacement" for the one given to the jury by the trial court and since the Respondent is now contending (as it did in the Court of Appeals) for a meaning of "discard" in the rule equivalent to "a legal transfer to another person" which is completely contrary to the normal meaning of that word as it was understood and applied by the jury, the Petitioners see no reason why they should be the only ones without a chance to "get in on the act" by a variation of the rule to suit themselves by reliance on these cases allowing coverage where there is "temporary retention" of the old car by the insured.

However, contrary to what Respondent alleges in its brief this "temporary retention" is not by any means Petitioners' sole argument—as even a cursory reading of the Petition will show—but is merely supplementary to our main argument. Petitioners are perfectly happy to have this case decided solely on the basis of the rule as given to the jury by the trial court, but think that everyone should be bound by the trial court's rule, not just the Petitioners.

At page 18 of Respondent's brief there are some statements made regarding the *Mitcham* case which are in gross error: Respondent first attempts to give the impression that in *Mitcham* the issue of notice was not regarded as being a decisive factor. Such allegation is erroneous as shown in the first instance by the *Brescoll* case, *supra,* which stated that in the *Mitcham* case the issue of notice was *"primarily"* the factor in deciding the case. This is also easily shown by the language of *Mitcham* itself which at page 29 of the opinion stated:

> "* * * The failure to give the notice was fatal to the claim of the administratrix and the injured person that the car was covered by the policy when the accident took place."

Respondent (page 18 of its brief) makes the erroneous statement that the Court of Appeals in deciding the case at bar did so in harmony with the *Mitcham* case on the issue of notice:

> "In other words, *Mitcham* recognized, *as did the Court below,* that there must be an actual re-

> placement *of which fact notice must be given,* but *Mitcham* was not decided solely on the question of notice and that decision is entirely consonant with the decision of the Sixth Circuit" (Emphasis added).

This statement of Respondent's gives the impression that the Court of Appeals gave proper recognition to the issue of notice in the case at bar whereas in point of fact it did nothing of the kind (as was repeatedly made clear in our Petition) but on the contrary the Court of Appeals said only that the issue of notice was not applicable (Petition, page 28 of Appendix) and did not thereafter give even a single reason for its failure to discuss the issue as is shown by the opinion of said Court.

Also in this same paragraph of Respondent's brief from which the above quotation was made there is another erroneous statement which we refer to:

> "* * * Under the Newly Acquired Automobile clause, supra, of the policy here involved, there must first be a replacement and if there is no replacement, notice, whether given or not, is of no effect and *furthermore this case was presented to the Court below solely on the question of whether or not there was, in fact and law, a 'replacement'* " (Emphasis added).

This statement that the issue of notice was not presented to the Court of Appeals is completely mystifying to us because it is 100% erroneous as can easily be demonstrated. In our brief to the Court of Appeals at pages 14-15 we said this to that Court on the matter of notice:

"In the instant case the Court submitted interrogatories and instructions to the jury which gave the jury the law of the case, expressed in language identical to that in the cases cited by State Farm in its brief and the jury apparently applied the law given by the Court to the facts which they deduced from the evidence and concluded as follows:

"(1) Mrs. Yenowine notified State Farm of the purchase of the 1956 Plymouth automobile and that she wanted the insurance changed from the 1953 to the 1956.

"(2) The 1956 Plymouth, in fact, replaced the 1953 Plymouth within the meaning of the law given the jury by the Court.

"The foregoing findings of the jury were to the exclusion of State Farm's theories that the 1956 replaced the 1955 or that the 1955 replaced the 1953, and if we accept as fact the finding of the jury that Yenowine notified State Farm's agent of the desired change of insurance from the 1953 to the 1956 (*and State Farm does not contest this in its brief*) then all possible dangers of dual insurance coverage were thereby removed, and any claim by Yenowine at a later date that the 1953 was insured under the policy would have been properly rejected on the basis of her notice. * * *"

In addition, during the oral argument of this case before the Court of Appeals counsel for Petitioners pointed out to that Court the feature of the policy requiring notice under the Newly Acquired Automobile clause and to which counsel for Respondent made no reply.

And the matter of notice was also brought to the attention of the Court of Appeals in our Petition for Rehearing.

The only explanation we can find for the Respondent's erroneous statements referred to hereinabove is that the writer of the Respondent's brief is making his very first appearance in this case—he did not even sit in on the trial as an observer—and is consequently unfamiliar with the proceedings; however, we do not understand why he did not check these matters with the trial counsel before putting them before this Court.

To summarize the Respondent's brief we show as follows:

1. The Respondent has been unable to cite a single case or any other authority for the proposition that an insured must first transfer the old automobile in a completely legal manner to someone else under the rules regarding "replacement" which say that the old car must be "discarded" or "disposed of," even though such interpretation is the only possible basis for upsetting the jury verdict that Mrs. Yenowine discarded the 1953 Plymouth. *Nor has the Respondent been able to give any valid reason why it should even be allowed to claim such a meaning to the word "discard" (or "disposed of") in the first instance since Respondent offered no objection to the trial court's instruction nor did it tender any instruction of its own but on the contrary let the jury decide the issue according to the normal meaning of the word* and is therefore estopped by Rule 51 of the Federal Rules of Civil Procedure.

2. Respondent has been unable to cite any authority for the proposition that the intervening 1955 Plymouth replaced the 1953 Plymouth and that the 1956 Plymouth replaced the 1955 Plymouth (as found by the Court of Appeals). This is not surprising since to do so Respondent would have been required to produce a case stating that a replacement (the intervening 1955 Plymouth) could be made not only contrary to the insured's intentions but also contrary to the policy which requires notice since it is undisputed that Mrs. Yenowine did not want the 1955 Plymouth as a policy replacement and never notified Respondent of said 1955 Plymouth (Record 28a).

In short, Respondent has utterly failed to make out a case to sustain its position and that of the Court below. All the cases the Respondent has relied upon on the issue of replacement (with the exception of the *Mitcham* case which has already been distinguished, *supra*), involve instances where a person owned more than one vehicle at the time of the issuance of his policy, only one of which was named in the policy, and afterward attempted to have the unnamed vehicle which had been involved in an accident considered as a replacement for the named one which had previously been rendered undriveable for some reason. The Courts have uniformly held in such fact situations that there is no replacement under the "Newly Acquired Automobile" clause for the reason that such a vehicle simply is not newly acquired but was owned either before or simultaneously with the issuance of the policy

to the insured. However, that is a completely different fact situation from the Yenowine case for the following reasons:

1. Mrs. Yenowine acquired her policy from Respondent on April 7, 1956 insuring the 1953 Plymouth (Record 26a).

2. Thereafter, she acquired the 1956 Plymouth on November 30, 1960 (Record 4b-5b).

So, beyond any doubt the 1956 Plymouth was newly acquired and fully qualified in fact and under the law as a replacement for the 1953 Plymouth named in the policy as the jury so found and as the trial court so held.

CONCLUSION.

For the foregoing reasons, and for the reasons stated previously, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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